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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30705/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14 August 2015	**On 18 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JACQUELINE GERLINE ISAACS
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Ms A Heller, Counsel

DECISION AND REASONS

1. The respondent to this appeal is a citizen of Jamaica born on 12 April 1969. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Griffith, allowing the respondent's appeal against a decision of the Secretary of State, dated 15 July 2014, to remove her to Jamaica, having refused her application for leave to remain on human rights grounds. The Secretary of State refused the application for leave on human rights grounds, having found Ms Isaacs could not succeed under Appendix FM or paragraph 276ADE of the

Immigration Rules, HC395, and there were no exceptional circumstances for the purposes of Article 8 of the Human Rights Convention.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Ms Isaacs from now on as "the appellant" and the Secretary of State as "the respondent".

3. After an error of law hearing on 5 June 2015 I set aside Judge Griffiths's decision and directed that the appeal should be re-heard *de novo* in the Upper Tribunal. A copy of my decision to set aside the decision of the First-tier Tribunal is appended to this decision.

4. I was not asked and saw no reason to make an anonymity direction.

5. The appellant arrived in the UK as a visitor on 6 October 2000, aged 31. Having overstayed her leave to enter she claimed asylum, although this was later denied by the appellant, who said the application had been made without her knowledge. The appellant was notified of her liability to removal on 22 May 2007. She made a human rights application on 25 March 2013 but this was refused on 22 June 2013 without a right of appeal. Fresh representations were made on 20 July 2013, which led to the decision now appealed. In her fresh representations, the appellant relied on her 12-year residence in the UK and her long-term relationship with Mr Franklyn Grant, a British citizen.

6. At the beginning of the hearing Mrs Heller explained she would not argue the appellant could meet the Immigration Rules either in terms of family or private life. The case was pursued outside the rules.

7. The appellant and Mr Grant attended the hearing to give evidence. The evidence and submissions have been recorded in full in my record of the proceedings. In reaching my conclusions and making findings of fact I have taken into account all the oral and documentary evidence even if I do not refer to all of it in this decision. At the end of the hearing I reserved my decision.

8. In immigration cases the burden of proof generally lies upon the appellant with respect to any assertions of fact which she makes. The standard of that proof is the balance of probabilities.

9. With specific reference to Article 8, concerning the right to private and family life, it is for the appellant to show that, as at the date of the appeal hearing, she has established family and/or private life in the United Kingdom and that her removal as a result of the respondent's decision would interfere with one or both of those established rights in a significant way. It is for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and amount to a proportionate response in the light of all the known factors and circumstances.

10. I make the following findings of fact.

11. The evidence was not the subject of serious challenge by Ms Fijiwala, who did not cross-examine the appellant and only asked Mr Grant a few questions. The reasons for refusal letter accepts there is a genuine and subsisting relationship between the appellant and Mr Grant and Ms Fijiwala confirmed that was her stance also. I find as fact they have been in a long-term relationship and that they have lived together since early 2013. They have now cohabited for more than two years. They have discussed marriage but have not yet made firm plans. The appellant is now 46 years of age and has resided in the UK continuously since her arrival in October 2000. Mr Grant is a British citizen of Jamaican origin, aged 61. He came to the UK as a visitor in 2001 and was granted indefinite leave to remain in 2011. He then returned to Jamaica for a 4-week holiday to see his grandchildren. The appellant has lost touch with her relatives in Jamaica. Mr Grant would not consider relocating to Jamaica because he does not think he would be able to find employment at his age. He is self-employed in construction here and he supports the appellant. The couple have a close circle of friends and relatives in the UK. They attend church. The appellant is particularly close to her uncle, Carlton (known as "Tom"), who has cancer, and her cousin, Peggy, who has lupus. She has been seeing Carlton most days since his condition has worsened. The appellant has been studying on a catering course and she wishes to complete her course.

12. It is conceded the appellant does not meet the requirements of the rules, which are designed to reflect the UK's obligation to give effect to Article 8 of the Human Rights Convention. The reason the rules are not met is that the appellant cannot meet the requirements for 'partner', as discussed in my earlier decision. Mrs Heller did not seek to argue the appellant had no ties with Jamaica given she lived there for 30 years before coming to the UK. I have kept in mind the greater specificity given to aspects of the public interest, as revealed in the rules. The rules set clear indicators of what must be weighed in the balance and the importance to be given to the factors set out in them.

13. However, despite Ms Fijiwala's arguments to the contrary, I find this is a case in which it is necessary to proceed to the second stage assessment of Article 8 principles in line with European and domestic case law (*Singh & Khalid v SSHD* [2015] EWCA Civ 74). The correct test is whether there are compelling circumstances not sufficiently recognised under the rules to require a grant of leave outside the rules on the basis of Article 8. Ms Fijiwala relied on *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387 in which the Court held that the general position is that compelling circumstances need to be identified to support a claim for leave outside the rules. This is a demanding test, reflecting the reasonable relationship between the rules themselves and the proper outcome of the application of Article 8 in the usual run of cases. When considering the question of whether leave should be granted under Article 8 I should give considerable weight to the Secretary of State's view, as reflected in the rules.

14. I find the key features of this case which show the potential for hardship are as follows. This is a longstanding relationship involving cohabitation of more than

two years. The appellant's difficulty with paragraph GEN.1.2 of Appendix FM could easily have been surmounted by a quick marriage but Mr Grant explained they did not wish to rush into it for immigration purposes. Mr Grant is not in the first flush of youth and he has given a reasonable explanation as to why he does not wish to relocate to Jamaica. Removing the appellant could potentially lead to the complete destruction of family life in this case. In my view these are exceptional circumstances which meet the demanding test described.

15. I therefore come to the Article 8 assessment outside the rules. The appellant seeks to resist removal on the basis of her protected right to enjoy her private and family life in the UK. I must approach my evaluation of this question in stages by reference to the five steps set out in paragraph 17 of *Razgar* [2004] UKHL 27, an approach confirmed in *EB (Kosovo)* [2008] UKHL 41. Those steps are as follows:

> Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> If so, is such interference in accordance with the law?
>
> If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> If so, is such interference proportionate to the legitimate public end sought to be achieved?

16. This is a case in which the determinative issue is the proportionality of the decision. The appellant and Mr Grant plainly enjoy family life. I accept this is a serious, long-term relationship and that it shows the necessary degree of commitment and endurance to come within the concept of family life for the purposes of Article 8 (*Kroon v Netherlands* (1995) EHRR 263).

17. I do not think it is reasonable to expect Mr Grant to start again in Jamaica in order to pursue family life there. Removing the appellant as a consequence of the decision would clearly amount to a significant interference with the enjoyment of family life. I bear in mind that the requirement to show a significant interference with family or private life should not be read as meaning the minimum level of severity required is a special or high one (see, for example, *AG (Eritrea)* [2007] EWCA Civ 801, paragraph 27).

18. On the other hand, removing the appellant would be lawful in the sense that it would be in accordance with the Immigration Acts and Rules and would be in pursuit of the legitimate aim of maintaining effective immigration controls, which is an aspect of the prevention of disorder. Removal is necessary because there is no other means of maintaining immigration controls in these circumstances.

19. I come to proportionality. My approach to the issue of proportionality is guided by the House of Lords decision in *Huang and Kashmiri* [2007] UKHL 11. The ultimate question for me is whether the refusal of leave to enter or remain, in the circumstances where the life of the family (or private life) cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of refusal, prejudices the family life (or private life) of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8 (see paragraph 20). Decisions taken pursuant to the lawful operation of immigration controls will be proportionate except in small minority of exceptional cases, identifiable on a case-by-case basis (*Razgar*, paragraph 20). However, that does not mean that there is a legal test of exceptionality or that any formula can be devised to ensure the expectation that only a small minority of cases will succeed in practice (*AG (Eritrea)*). I have therefore assessed the degree of interference in this case and balanced it against the public expectation that the rules are applied.

20. In assessing the public interest I must take account of the factors listed in section 117B of the 2002 Act, as follows:

> "117BArticle 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) …"

21. The appellant has explained how she sought to extend her leave and also that she was ill-advised in the initial stages by representatives who were subsequently investigated by the OISC. However, she has never been granted leave after entry

and her stay has always been at best precarious and at worst illegal. She established her private life ties and, ultimately, her family life ties with Mr Grant in the knowledge she might have to leave the UK. Accordingly, little weight can be given to it when set against the public interest in maintaining immigration controls. accept the appellant speaks English and is supported by Mr Grant. However, these matters do not weigh significantly against the public interest.

22. Ms Fijiwala made submissions on the application to this case of the principles established in *Chikwamba* [2008] UKHL 40. In that case, in considering the Home Office's policy of requiring people to go back to obtain entry clearance, which is set out in paragraph 37, the House of Lords overturned the decision of the Court of Appeal to the effect that firm immigration control required consistency of treatment between aspiring immigrants and waiving the requirement for prior entry clearance was unfair to others who were content to take their place in the entry clearance queue.

23. Lord Brown described the real rationale behind the policy as deterrence. He continued:

> "42. Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, *Ekinci* still seems to me just such a case. The appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case—see in this regard *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. In an Article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence.
>
> 43. As matters presently stand the published policy appears to apply routinely to all Article 8 family life cases irrespective of whether or not the rules apply:
>
> > "A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance …"
>
> And for the reasons given in para 36 above it is, indeed, entirely understandable why someone outside the rules should not be better off. Oddly, however, when asked to explain why in those circumstances the appellant in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, seeking to remain here to enjoy family life with his emotionally dependent mother, was not first required to apply for entry clearance abroad, the Secretary of State (in a post-hearing note) said:

> "Mr Betts did not … on the face of it fall within the scope of any relevant immigration rule designed to enable him to enjoy family life in the United Kingdom. In those circumstances it was not argued that Mr Betts should return to Sierra Leone to apply for entry clearance to join his family in the United Kingdom."
>
> I cannot reconcile that explanation with the stated policy. Nor has any explanation been offered as to why the policy was not applied also to the appellant Mr Kashmiri in *Huang*, who did not qualify under a rule requiring entry clearance but who was asserting a family life claim to remain here under Article 8.
>
> 44. I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The Article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under Article 3 or Article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and Article 3 claims. Suppose that these fail. Should the Article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the Article 8 claim be decided once and for all at the initial stage. If it is well founded, leave should be granted. If not, it should be refused."

24. The facts of this appeal are different from those in that case. The appellant came to the UK as a short-term visitor. She understood the terms of her leave to enter. *Chikwamba* concerned a failed asylum seeker from Zimbabwe, married to a refugee from Zimbabwe, with a child of the marriage. That it was disproportionate to expect the appellant to return to Zimbabwe, with or without her child, where conditions were "harsh and unpalatable", and remain there for some months in order to obtain entry clearance to return to the UK at her own expense was overwhelmingly clear (paragraph 46; see also Lord Scott). In contrast, the appellant in this case will have to remain in Jamaica for no more than a maximum of 90 days while an application for entry clearance is processed. 92% of applications are processed in 60 days. Mr Grant acknowledged he would be able to cope with such a short separation and he also has the option of visiting the appellant during that time.

25. The Court of Appeal in *KH (Pakistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1054 confirmed that the assessment is fact-sensitive and emphasised that the House of Lords had identified certain factors as potentially relevant, including the prospective length and degree of disruption to family life and whether other family members are settled in the UK. In *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 (IAC) it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an

individual to return to her home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights.

26. To answer the question whether there is a sensible reason to enforce the policy, I note there is no evidence showing that the financial requirements of Appendix FM, coupled with the documentary requirements set out in Appendix FM-SE, can be met. There is therefore very good reason to require the appellant to submit herself to the process of applying for entry clearance so that a full analysis of this point may be undertaken by the entry clearance officer. It would not be a 'futile exercise'. Temporary separation for this purpose would not involve a significant interference with family life currently enjoyed. I set little store by the appellant's evidence that she could not be separated from her uncle or cousin, both of whom are very unwell. It would be unfortunate that they would be deprived of the appellant's support which they no doubt value. However, her absence can be assumed to be temporary while she arranges her visa and it has not been shown there would be harsh consequences for the individuals concerned.

27. The respondent's decision to remove is proportionate and I dismiss the appellant's appeal on Article 8 grounds.

NOTICE OF DECISION

The appeal is dismissed.

No anonymity direction has been made.

Signed **Date 14 August 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal

APPENDIX

1. The respondent to this appeal is a citizen of Jamaica born on 12 April 1969. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Griffith, allowing the respondent's appeal against a decision of the Secretary of State, dated 15 July 2014, to remove her to Jamaica, having refused her application for leave to remain on human rights grounds. The Secretary of State refused the application for leave on human rights grounds, having found Ms Isaacs could not succeed under Appendix FM or paragraph 276ADE of the Immigration Rules, HC395, and there were no exceptional circumstances for the purposes of Article 8 of the Human Rights Convention.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Ms Isaacs from now on as "the appellant" and the Secretary of State as "the respondent".

3. I was not asked and saw no reason to make an anonymity direction.

4. The appellant arrived in the UK as a visitor on 6 October 2000, aged 31. Having overstayed her leave to enter she claimed asylum, although this was later denied by the appellant, who said the application had been made without her knowledge. The appellant was notified of her liability to removal on 22 May 2007. She made a human rights application on 25 March 20013 but this was refused on 22 June 2013 without a right of appeal. Fresh representations were made on 20 July 2013, which led to the decision now appealed. In her fresh representations, the appellant relied on her 12-year residence in the UK and her long-term relationship with Mr Franklyn Grant, a British citizen.

5. At the appeal hearing before Judge Griffith, at which the respondent was not represented, submissions were made to the effect the appellant fell within paragraph EX.1 of Appendix FM of the Immigration Rules, HC395. It was argued there were 'insurmountable obstacles' to family life continuing outside the UK. Alternatively a "freestanding" Article 8 assessment should be conducted outside the rules.

6. The judge heard oral evidence from the appellant and from Mr Grant. She was told the appellant and Mr Grant had been cohabiting since 2013 and that they planned to marry. The appellant thought she would find it difficult to find work as a chef and Mr Grant did not want to live in Jamaica because of the violence. Mr Grant has adult children in Jamaica. The judge found both witnesses credible. She accepted they were in a genuine and subsisting relationship and concluded they were partners for the purposes of paragraph GEN.1.2 of Appendix FM, although she did not say why she reached this conclusion (see paragraph 28). The judge therefore went on to consider whether there were insurmountable obstacles to family life continuing in Jamaica. She set out the definition of 'insurmountable obstacles' provided in paragraph EX.2 of the rules and directed herself in terms of the guidance given in Izuazu

(Article 8 – new rules) [2013] UKUT 45 (IAC), a case promulgated before paragraph EX.2 was inserted into the rules.

7. The judge began her consideration of the facts at paragraph 32. She noted the appellant had been in the UK since 2000 and for most of that time had not had leave. However, she appeared to have been badly served by her first legal representatives. The fact she had made attempts to regularise her stay should not be discounted. The appellant was now 45 years of age and had been absent from Jamaica for 14 years. There was no evidence she had ever returned there and the judge accepted the appellant had no close family members there. She plays a significant part in the lives of her extended family members in the UK. There was no evidence she had ever practised deception or been in trouble with the police. Mr Grant was 60 years of age and had lived in the UK for 13 years. He had expressed concern that he would not be able to find work in Jamaica and he had no savings. It would not be reasonable to expect him to move to Jamaica with the appellant. There was a risk Mr Grant would have no means of supporting the appellant. The judge concluded, in paragraph 36, that the difficulties the couple would face on return to Jamaica would be very considerable and would involve an unreasonable degree of hardship. Therefore, the appellant succeeded under paragraph EX.1(c). In view of her finding on family life the judge did not go on to make findings under paragraph 276ADE.

8. The grounds seeking permission to appeal argue the judge erred in finding the appellant met the requirements of paragraph GEN.1.2 of Appendix FM. It was unclear whether the judge found the appellant was a fiancée. There was no evidence the couple planned to marry within six months (see paragraph D-ECP.1.1 of Appendix FM). The judge therefore erred in going on to look at paragraph EX.1. In applying the test of insurmountable obstacles, the judge erred by applying a reasonableness test and, in any event, the found facts did not reach the high threshold of insurmountable obstacles set out in paragraph EX.2.

9. Designated First-tier Tribunal Judge Coates granted permission to appeal to argue both grounds.

10. No rule 24 response has been filed on behalf of the appellant.

11. I heard submissions as to whether the judge made a material error of law. Ms Brocklesby-Weller's submissions followed the grounds seeking permission to appeal. Ms Heller replied but effectively accepted the judge erred in finding the appellant and Mr Grant were partners for the purposes of paragraph GEN.1.2. She pointed out the definition contains the phrase "unless the context otherwise requires" which had not, to her knowledge, been the subject of any guidance. She did not press me to find this extension of the definition of 'partner' should apply, particularly as it was unclear on what basis the judge had found it did apply. Ms Heller did not argue the judge must have regarded them as fiancés given the definition of 'fiancé' found elsewhere in Appendix FM.

12. I find the judge made a material error of law in concluding the couple were partners. The absence of reasons for this conclusion on her part is indicative of her misdirection. At the time of the application, the couple had only been living together for a period of approximately 11 months. The definition in paragraph GEN.1.2 sets a minimum period of cohabitation akin to marriage prior to the date of application of two years. That test was plainly not met on the facts found by the judge. She set out the evidence in paragraph 22 that they had lived together for about one and a half years. That was in November 2014 which means they began cohabiting in around May 2013. The date of application was 23 April 2014. The error was material because, if the judge had found the couple were not partners, there would have been no consideration under paragraph EX.1. The appeal will have to be re-heard. The parties agreed this should take place in the Upper Tribunal.